107 I.A. 2nd 113

52285

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TOLIT ZEGAR, otherwise called TOLLAT ZEGAR, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Honorable William S. White, Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial, defendant, then eighteen years of age, was found guilty of burglary. He was sentenced to two to six years in the penitentiary. On appeal, defendant contends the minimum sentence was excessive and should be reduced by this court.

The evidence shows that on August 13, 1966, defendant and two others burglarized a motorcycle shop and took a motorcycle, which was recovered the next day.

At the hearing in aggravation and mitigation, the State showed that defendant had a past history of two felonies, which were reduced to misdemeanors. The State recommended a minimum of five years and a maximum of ten years in the penitentiary.

Arguing in mitigation, defendant's attorney made an earnest request for a lesser sentence and probation. In substance, he stated that defendant "had just married, and at his youthful age such a marriage might well not endure a prolonged absence. If not interrupted, it might well be the key to his rehabilitation. His family background is another point in favor of an early reunion with his own family, for his father comes from a good background and seems the type who could be an excellent influence. His education could easily be resumed at his age. To a boy, hardened by long incarceration, these influences could be lost."

The State contends that the sentence was a proper exercise of judicial discretion in view of defendant's prior criminal conviction and the nature of the offense charged.

In considering the matter, we are mindful of defendant's age and background, but after examining this record we regret to conclude that this is not a proper case for the exercise of the statutory power to reduce the punishment imposed by the trial court. The sentence is within the statutory limits, and it is proportionate to the nature of the offense. See People v. Gold, 38 Ill.2d 510, 518, 232 N.E.2d 702 (1968).

As we cannot say that the punishment imposed was excessive, the judgment of the trial court is affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

107 I.A. 2nd 122

52749

MICHAEL GRIFFITH, a minor, by WILLIAM GRIFFITH, his father and next friend,

Plaintiff-Appellee,

vs.

VILLAGE OF DOLTON, a municipal corporation,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HON. NORMAN C. BARRY PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Village of Dolton, from a judgment for the plaintiff upon a verdict of $8,000.00 recovered by plaintiff on account of injuries resulting from a fall alleged to have been caused by an unsafe and dangerous condition of a public sidewalk.

The record reveals that about noon on July 1, 1960, a number of children were playing a game of "cops and robbers" near their homes in the Village of Dolton. The object of the game was that the robber, who was on foot, was not to get caught by the cop , who was on a bicycle. The plaintiff, a seven year old boy, was a robber and was in the group being chased. As the plaintiff was running and looking back over his shoulder to see if the cop chasing him was gaining, he fell on the sidewalk and broke his elbow.

Michael Griffith, plaintiff, testified that he tripped and fell when his right foot struck a tar strip separating the concrete squares in the sidewalk in front of the Munson residence. He identified the place where he fell from a photograph which showed the tar strip in question. On cross-examination he testified that he never saw that tar strip before the day of the accident or before he fell. He estimated that the tar strip was about an inch and one-half high and that it ran the width of the sidewalk.

Jean Winters testified that she was the cop on a bicycle chasing the plaintiff. She saw him turn to look back when she was two or three feet from him and "as he turned back to go forward his right foot hit a tar piece and tripped and fell and broke his arm." She described the tar strip as being about an inch high "but in some places it was higher and on the side grass was growing over the sidewalk and inside the tar." She testified further that she noticed this tar strip for the first time about two years before the occurrence and that she looked at it after the plaintiff fell. She pointed out the tar strip from a photograph and stated that it was the place where plaintiff fell. On cross-examination she said that there were no other tar strips to the north of the one in question.

William Griffith, plaintiff's father, testified that the sidewalk in question had five foot square cement slabs with tar strips in between the separation joints. He said the tar strip was one and one-half to two inches high above the surface of the sidewalk and that the condition of the strip had not changed in the two or three months before the occurrence.

Paul Munsen testified that he had resided in the premises about eleven years and that after he learned of the occurrence he examined the tar strips between the section of sidewalk in front of his home. He stated that the height of the strip was no more than three-fourths of an inch. Mr. Munsen's estimate was corroborated by the testimony of his wife, although she said she could not give an exact measurement.

The Village contends that the verdict of the jury is not only against the manifest weight of the evidence, but there is no probative evidence to support it, and that the failure to direct a verdict for the Village was prejudicial error re-

quiring reversal. It is urged that though the sidewalk was put in by a builder more than three years before the occurrence, there is no evidence that the sidewalk became dilapidated, fragmented, separated, or that the concrete slabs achieved different levels, or were in disrepair, as is the case in most of the reported cases.

The Village points out that it is common knowledge that the purpose of a tar expansion strip is to expand and contract with the temperature, and the strip is a natural, necessary and useful part of every sidewalk. It argues that natural conditions are not considered to be defects. The placement of a thing for a necessary and useful purpose is not negligence. Bennett v. Illinois Power and Light Corporation, 355 Ill. 564, 189 N.E. 899. The Village also argues that since it received no complaints that there was anything wrong with the tar expansion strip during the three year period the sidewalk was in existence, it is not liable, citing Jochens v. City of Chicago, 6 Ill. App. 2d 144, 127 N.E.2d 142.

We turn first to the question of whether the plaintiff presented sufficient evidence to take the question of the alleged unsafe condition of the sidewalk to the jury. The plaintiff's witnesses testified that the tar expansion strip between the two pieces of cement sidewalk protruded about one and one-half to two inches over the sidewalk. One of the witnesses testified that this condition existed for over three months before the occurrence in question while another said it existed for two years. In addition, the jury was given four photographs of the sidewalk to consider. The tar strip was clearly shown in all four.

We think there is substantial evidence in support of the charge that an unsafe condition of the public sidewalk brought about by the protruding tar expansion strip, did exist at the point in question where the accident occurred and that there is

evidence on behalf of the plaintiff, which, standing alone, entitled him to have the cause submitted to a jury. White v. City of Belleville, 364 Ill. 577, 5 N.E.2d 215. Furthermore, we hold that there was constructive if not actual notice of the alleged defect. Pickens v. City of Kankakee, 200 Ill. App. 547. For the foregoing reasons we think that there was evidence which, if believed, tended to prove the essential elements of the plaintiff's cause of action and, therefore, the defendant Village was not entitled to a directed verdict.

We have carefully read the cases cited by the defendant in support of its first contention. We conclude that the facts in this line of cases are substantially different from those in the case at bar and that those cases are not determinative here.

The defendant also contends that the plaintiff should have introduced the exact measurement of the height of the tar strip rather than to force the jury to rely on estimates supplied by the plaintiff's witnesses. The defendant maintains that "[t]here is no reason to conjecture or guess as to the size of a physical object capable of measurement. This was plaintiff's burden." We find no merit to this contention. Neither side offered the actual measurements of the tar expansion strip even though it was easily accessible and available to both parties. The jury heard the estimates of both sides regarding the height of the strip and it was within their province to determine which set of witnesses were believable. Furthermore, the jury was not required to find the facts to an absolute certainty or beyond a reasonable doubt as in a criminal case.

In its last contention, the defendant argues that plaintiff's case was so speculative and conjectural that the refusal of the circumstantial evidence instruction was prejudicially erroneous. The refused instruction is I.P.I. 1.03, which reads as follows:

> A fact may be proved by circumstantial evidence. Circumstantial evidence consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the fact sought to be proved.

In the colloquy between the defendant's counsel and the court on the tendered instructions the court inquired whether there were any more instructions:

> "Mr. Sam Hamel: The instruction on Circumstantial Evidence. I have prepared a cautionary instruction, and I am trying to determine whether or not we need it....
>
> I will tender it and state one point in this regard. We have had testimony as to how he was turning his body. I think it gives rise to substantial inference the method or manner in which he fell. I'm going to in this case submit it.
>
> The Court: There is no circumstantial evidence at all in this case.
>
> Mr. Sam Hamel: And I will object to that."

Under the facts and circumstances in this case we hold that it was not error to refuse this instruction and that the defendant was not prejudiced thereby.

For the reasons stated the judgment is accordingly affirmed.

AFFIRMED.

ADESKO, P. J. AND MURPHY, J.

CONCUR. (Abstract only)

107 I.A. 2nd 212

52635

BETTY BADAR, Plaintiff-Appellant, v. W. H. LYMAN CONSTRUCTION COMPANY, a corporation, and ILLINOIS BELL TELEPHONE COMPANY, a corporation, Defendants-Appellees.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY, COUNTY DEPARTMENT, LAW DIVISION. Honorable Sigmund J. Stefanowicz, Judge Presiding.

MR. JUSTICE CRAVEN DELIVERED THE OPINION OF THE COURT.

In July of 1961, the defendant, Lyman Construction Company, as a contractor for the Illinois Bell Telephone Company, was doing certain construction work at 63rd and Pulaski Streets in the city of Chicago. The construction necessitated some tearing-up of the street and some digging and trenching. At about 4:00 p.m. on the 19th of July, the plaintiff was a passenger on a Chicago Transit Authority bus. She rode a southbound Pulaski Street bus to 63rd Street, got off the bus and crossed from the northwest corner of the intersection to the northeast corner of the intersection for purposes of boarding a westbound 63rd Street bus.

The construction work of the Lyman Construction Company was on the east side of Pulaski and on the north side of 63rd Street and in the area of the bus stop. Because of the construction and because of a truck, the westbound 63rd Street bus stopped east of the ordinary bus stop and in the lane immediately north of the center of 63rd Street rather than in the northernmost lane of the four-lane street. As the plaintiff stepped from the curb, as the last of several persons attempting to board the bus, and while en route to the bus, she fell and sustained injuries.

She testified that she did not see anything that would interfere with her footing until after the fall, and that after the fall she saw small pieces of gravel and clay--the same as that which was piled up in the area of the construction.

Plaintiff instituted this action for personal injuries against Lyman Construction and Illinois Bell to recover for her injuries, and in her complaint charged both with negligence in placing

rocks, clay and other debris in the area used by plaintiff and other pedestrians.

At the close of the plaintiff's evidence the trial court entered a finding in favor of the defendant, Illinois Bell Telephone Company, and at the conclusion of the trial the jury returned a verdict of not guilty as to the Lyman Construction Company.

In her post-trial motion the plaintiff asserted that the trial court committed error in its finding for the defendant, Illinois Bell, and claimed error as to certain rulings by the trial court in sustaining objections during the closing argument of counsel for the plaintiff to the jury. The post-trial motion was denied and this appeal follows.

Only two issues are presented in this court for decision--(1) whether the trial court erred in making its finding for Illinois Bell, and (2) the propriety of the rulings in sustaining objections during the final argument of plaintiff's counsel to the jury. There is no assertion that the verdict of the jury is contrary to the manifest weight of the evidence. In that posture of the case it is clear that either the Lyman Construction Company was not guilty of actionable negligence or that the plaintiff was guilty of contributory negligence.

The trial court did not commit error by entering a finding for Illinois Bell. There is no evidence in this record to substantiate the allegations of negligence as to Illinois Bell. It is clear that the Lyman Construction Company was working under a contract with Illinois Bell as an independent contractor. Illinois Bell retained the right to inspect the work and the evidence would establish the right to stop the work if it were being done in an unsatisfactory manner. There is no allegation in the complaint, nor any evidence, that the failure of Illinois Bell to inspect or the failure to stop the work was in any way a proximate cause of plaintiff's injury. Thus, the case of Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964), upon which the plaintiff relies, has no application here. Inasmuch as there was no evidence of negligence as to Illinois Bell, the trial court properly made a finding in its behalf. Pedrick v.

Peoria & Eastern R.R., 37 Ill. 2d 494, 229 N.E.2d 504 (1967); Clark v. Quincy Housing Authority, 86 Ill. App. 2d 458, 229 N.E.2d 780 (4th Dist. 1967).

As to the second issue plaintiff, in her excerpts from the record, has not set forth the full closing arguments to the jury. Indeed, only short segments of the argument of plaintiff's counsel are excerpted. We have examined the record and the entire argument, and find no reversible error in the action of the trial court in sustaining certain objections to portions of the argument of plaintiff's counsel.

In this case the plaintiff, as the appellant, chose to use excerpts from the record instead of an abstract of the record. This is permissible under the rules. When this method is chosen, however, the appellant has the responsibility, as in the case of an abstract, to present all the issues urged as error in the trial court. In Nappier v. Cobb, 78 Ill. App. 2d 419, 222 N.E.2d 814 (4th Dist. 1967), we observed that an abstract which contained only a portion of the closing argument of counsel for the defendant was wholly inadequate to enable the Appellate Court to pass upon error alleged to have been committed in that argument. That which we there observed as applicable to abstracts of record is equally applicable to excerpts from the record. The judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

TRAPP, P.J. and SMITH, J., concur.

52867

MICHAEL LEVITT, HAROLD MANDELL and HENRY RUSH, d/b/a BROADWAY INSURANCE AGENCY, Plaintiffs-Appellants, v. LEWIS T. TAYLOR, d/b/a TAYLOR AND COMPANY, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, a Corporation, and AETNA LIFE AND CASUALTY INSURANCE COMPANY, a Corporation, Defendants-Appellees.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY. Honorable Cornelius J. Harrington, Judge Presiding.

MR. JUSTICE CRAVEN DELIVERED THE OPINION OF THE COURT.

This appeal arises upon judgment orders entered granting the motions of two of three defendants to dismiss the complaint and dismissing them from the case with prejudice. The judgment orders found that no reason existed to delay appeal of the orders.

Plaintiffs, Michael Levitt, Harold Mandell and Henry Rush, insurance brokers licensed by the State of Illinois, operating a partnership under the name of Broadway Insurance Agency, filed a complaint in equity against Lewis T. Taylor, The United States Life Insurance Company in the City of New York (hereinafter referred to as "U. S. Life") and Aetna Life and Casualty Insurance Company (hereinafter referred to as "Aetna"). The complaint prayed for discovery, injunction and accounting of commissions claimed due from the production of insurance business by plaintiffs.

The suit is based upon two written producer's contracts between plaintiffs and Taylor, as general agent for U. S. Life, and upon the production of health and accident and other insurance business which plaintiffs allegedly produced and placed through Taylor, as general agent, with Aetna. The contracts with U. S. Life provided that the producer would have no claim against U. S. Life for commissions except under certain conditions which do not apply here.

Plaintiffs' complaint alleged that through their efforts, individual life insurance policies on the officers and members of The United Brick and Clay Workers of America, a union, were placed

through Taylor with U. S. Life; that a large number of health and accident policies, automobile liability policies and hospitalization policies, and other insurance for such persons was placed through Taylor with Aetna. They contend that the records of such policies and premiums were kept in Taylor's office. Plaintiffs further allege that Taylor, U. S. Life and Aetna have refused to give them a complete list of these policies, the premiums paid, and the commissions due; have refused to account for such commissions; and have failed to pay them the commissions due. They further alleged they did not know the exact number of policies involved or the amount of premiums paid, and therefore could not state the amount due them. They thus contend that they lack an adequate remedy at law and seek relief in equity.

We find no basis in the complaint for a proceeding against either of the defendants, U. S. Life or Aetna. It is evident that the contracts upon which plaintiffs base their claim of commissions provide that Taylor will owe and pay commissions on insurance business produced by them and placed through Taylor with U. S. Life. These contracts created no duty or obligation upon U. S. Life to pay commissions to plaintiffs but in fact, to the contrary, expressly provided there would be no such liability. Likewise, no relationship is shown to have been created between plaintiffs and Aetna by which Aetna owes them any commissions. The relationship between the producer and the general agent created no direct legal or equitable relationship between the producer and the insurance companies issuing the insurance policies which would give rise to this action.

The claim is a request for equitable relief for an accounting, discovery and an injunction. While courts of equity have jurisdiction to state and settle accounts or to compel an accounting, and incidental thereto to require discovery, such jurisdiction will be exercised only where the complaint alleges some special or substantial ground of equity jurisdiction, such as fraud, the existence of a fiduciary relationship, the need for discovery, or the mutuality or complexity of accounts. Burr v. State Bank of St. Charles, 344

Ill. App. 332, 100 N.E.2d 773 (2d Dist. 1951); 1 Am. Jur. 2d, Accounts and Accounting, sec. 51, at 423.

The complaint here failed to allege any grounds showing equitable jurisdiction as to U. S. Life and Aetna. No acts of fraud are alleged and no fiduciary relationship existed between plaintiffs and these two defendants. No facts appear in the complaint which would give rise to an accounting by defendants, U. S. Life or Aetna, or show a need for discovery as to them. A suit will not lie against a party solely for the purposes of discovery. The discovery procedures established by the Civil Practice Act and the rules of the Supreme Court pursuant thereto provide ample means of discovery both as to parties and nonparties. Further, the complaint alleges that the records of policies and premiums paid for the policies involved were kept in the office of Taylor and under his direction. No reason appears why the matters desired to be discovered cannot be obtained by the usual discovery procedures as to such records.

There is also a complete failure of the complaint to allege any facts showing a proper ground for injunctive relief. While the complaint alleges that ". . . plaintiffs lack an adequate remedy at law.", there are no sufficient facts in the complaint to substantiate such a conclusion. Further, to secure injunctive relief, it is an essential requirement that a plaintiff must allege and prove that he will suffer irreparable injury should an injunction not be granted. Haack v. Lindsay Light & Chem. Co., 393 Ill. 367, 66 N.E.2d 391 (1946). Liberty Nat'l Bank of Chicago v. Metrick, 347 Ill. App. 400, 106 N.E.2d 889 (1st Dist. 1952). Since the complaint contained no allegations of facts showing irreparable injury will result to plaintiffs by the continued payment of commissions by defendants to Taylor, this material allegation for injunctive relief was missing.

The trial court was correct in determining that the complaint stated no cause of action as to U. S. Life and Aetna and in dismissing these parties.

JUDGMENT AFFIRMED.

Trapp, P.J., and Smith, J., concur.

107 I.A. 2nd 222

No. 68-148

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

Abstract

J. V. MILERIS,

Plaintiff-Appellee,

vs.

ALFRED G. MILLER, DELORES M. MILLER, PETERS VAN AND STORAGE COMPANY, INC., an Illinois Corporation, and F. P. PETERS,

Defendants-Appellants,

and

ALFRED G. MILLER and DELORES M. MILLER,

Counter-Plaintiffs,

vs.

J. V. MILERIS, PETERS VAN AND STORAGE COMPANY, INC., an Illinois Corporation, F. P. PETERS and ELMER E. PETERSON,

Counter-Defendants,

and

ALFRED G. MILLER and DELORES M. MILLER,

Third Party Plaintiffs,

vs.

ELMER E. PETERSON,

Third Party Defendant.

Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Counter-Plaintiffs, Alfred G. Miller and Delores M. Miller, appeal from an order denying their motion to vacate certain judgments entered against them. The motion was filed within thirty days of the entry of the judgments.

The plaintiff, J. V. Mileris, had purchased a home from the Millers under an agreement which included a rider providing that the sellers, as part of the purchase price, would leave certain personal property in the home. Initially, Mileris filed a complaint for injunction to restrain the Millers from removing the personal property from the residence. Although the injunction was ordered, it appeared that the property in question was already in the hands of Peters Van and Storage Company, Inc., packed in with the other personal property of the Millers, which was received for shipment to another state.

Mileris then filed an affidavit for replevin and amended his complaint to a demand for possession of the property or its value. The Storage Company filed an answer, submitting the items of personal property to the jurisdiction of the Court, and filed a counterclaim against both Mileris and the Millers for expenses resulting from the litigation.

The Millers filed an answer and also a counterclaim to the claim of the plaintiff, claiming that he detained personal property in the amount of $2,000 from them. The Millers also filed a third party complaint against one Elmer E. Peterson, the broker in the sale of the property, alleging that the broker exceeded the scope of his authority in including the items of personalty and asking judgment against the broker in the event the Millers were required to pay any judgment. Millers also filed a counterclaim against the Storage Company alleging excessive charges. The Millers also filed a counterclaim against the broker Peterson, again claiming he had exceeded his authority and praying for judgment in the amount of $5,000 against him.

The case was first set for trial on December 13th, 1967. On December 13th it was continued to February 14th, for completion of

pre-trial proceedings and pleadings against the additional defendant; on February 14th it was continued to March 11th, 1968, on the motion call; and on March 11th, 1968, it was continued for trial to April 18th, 1968. The record does not reflect the moving party on the various continuances, but counsel for the Millers states that it was on his motion that the case was set for the April 18th trial date.

The order entered on April 18th, 1968, recites that the matter came on to be heard on the amendment to the complaint, upon the counterclaim and crossclaim and upon the third party complaint and counterclaims; recites the hearing of testimony, and orders that Mileris be declared to be the owner of the personal property itemized in the rider attached to the offer to purchase, noting that both the offer to purchase and the rider were admitted into evidence; and orders that judgment be entered in favor of Mileris against the Millers in the amount of $1,080, plus costs of suit, that the counterclaim by the Storage Company against Mileris be denied, that judgment be entered in favor of the Storage Company on its cross claim against the Millers in the amount of $689.75, and that the third party complaint and counterclaim of the Millers be dismissed as to all defendants and judgments entered in their favor.

The motion to vacate the judgment under Section 50(6) of the Civil Practice Act was accompanied by the affidavit of Donald J. Weaver.

The affidavit recited his sole familiarity with the case and stated that at the time the case was set for trial, the order provided that it was to be before Judge Mahoney, but nevertheless the file was in the hands of Magistrate Whipple for trial on that date; that "after March 11th, 1968, when this case was set for trial" a letter was sent to Miller on March 29th, 1968, at the only known

address in Florida to advise him of the date of April 18th, but at that time Mr. Miller was involved in some development in Jamaica and was transient and without a permanent address aside from the box address to which the letter was sent; that on April 17th, Mr. Weaver talked to the attorney representing Mileris and advised him that he had received no response from his client and that he was going to request a continuance; that the attorney responded he would make an objection for the record only; that Weaver then called the office of the attorney for the Storage Company and the attorney for Peterson to advise them of the intention to request a continuance; that on the morning of April 18th, he inquired for the file and found that it was not in Judge Mahoney's room (apparently Judge Mahoney was elsewhere on that date).

It was further alleged that he had another case set specifically for trial on the same date of April 18th before another Magistrate, and that in the course of that hearing the attorney for Mileris came into the room where that trial was being conducted and indicated that Judge Whipple desired to see him; that he then appeared before Judge Whipple who advised him that the case was to proceed to trial; that he made a statement to the Court at that time that the client was unavailable and out of the jurisdiction, and that he was engaged in the trial of another cause and requested a continuance, but that this oral motion was summarily denied; that he then suggested to the Court that the cause involved matters over which he had no jurisdiction, namely an injunction, and that the matter should be put over, but that this suggestion was rejected; that he asked for a recess to see if some other member of the firm could act, but found no one available; that he continued his participation in the trial of the other case and during the afternoon prepared and filed a written motion for a continuance supported by an affidavit.

An affidavit of Alfred Miller was also attached to the motion to vacate, alleging that he had been engaged in a business venture in Jamaica for the past six months from the date of the affidavit (April 29th, 1968), and that he did not receive his lawyer's correspondence notifying him that the above matter was set for trial on April 18th.

The record shows that the written motion for the continuance filed on the date of trial states that the defendant is out of the State of Illinois and that counsel is engaged in another trial. Weaver's supporting affidavit merely alleges that he is engaged in the trial, which he designates. (There is nothing in the affidavit with reference to the absence of the defendant Alfred Miller, or any explanation relating to the defendant Delores M. Miller, his wife.)

Appellants argue that the refusal to grant a continuance under the circumstances was an abuse of discretion and that the motion to vacate the judgment should have been granted in the interests of justice.

Appellees argue that the refusal of a continuance rests within the sound discretion of the Court; that the motion for a continuance contained conclusions and did not show why the presence of Miller was essential; and that lack of diligence was affirmatively shown by the facts that the cause was set for trial on March 11th, 1968, but that the attorney for Miller did not attempt to contact him until March 29th, 1968.

We consider the case in the context of a default hearing, rather than one involving only the issue of the trial court's discretion in denying a continuance for the absence of a party. The facts differ somewhat from those in the usual default case in that the defendant Alfred G. Miller's attorney had knowledge

of the trial date, having set it himself, and was present in Court on the date set. However, his clients were not present and the defendant, Alfred Miller, claimed lack of knowledge of the trial date. When the attorney walked out and refused to participate in the trial, the cause proceeded with evidence being taken only from the other parties, as by default. See Natale v. Enterprise Pub. Co., 82 Ill. App. 2d 105, 107 (1967).

While we have noted, as the defendants suggest, the trend of cases expressing the view that the Court shall be liberal in setting aside default judgments when it would appear that justice will be promoted thereby (See Widicus v. Southwestern Elec. Co-operative, 26 Ill. App. 2d 102, 109 (1960); McLaughlin v. McLaughlin, 83 Ill. App. 2d 160, 162 (1967); Trojan v. Marquette Nat. Bank, 88 Ill. App. 2d 428, 437 (1967)), we find, under the particular circumstances of this case that the trial court did not abuse its discretion in refusing to vacate the judgment.

The Court could properly have concluded that its orderly procedures were being too lightly disregarded. A notice for a continuance was not served so as to bring the absence of the party before the Court on an earlier date when the other parties would not have had to be present to protect against the Court's requiring, as it did, that the parties proceed on the date long set. No written motion or affidavit for a continuance was presented at the time the continuance was sought; and even the oral representations were only to the effect that the attorney had not heard from his client (but it also later appeared that he had not written to him, advising him of the trial date until some eighteen days after the case had been specially set), and that he had started trial on another matter because his client was not present. The Court was not informed of any reason for setting the other case

on the same date as this one had been set, or for starting the other case, or of any attempt to continue the other case. There was no suggestion to the Court of what facts the missing party could testify to, or why Mrs. Miller, who also signed the contract, was not available and couldn't testify.

The written motion and affidavit for a continuance filed later in the day contained the same lack of showing of reasonable excuse for a continuance. An affidavit for a postponement of a trial on account of the absence of a party which shows no just reason for his absence, and fails to show that there are any facts which can be proved by the witness and which cannot be proved by any other witnesses, is wholly insufficient. Hazen & Lundy v. Pierson & Co., 83 Ill. 241, 242 (1876). The affidavit of the defendant Alfred G. Miller attached to the motion to vacate stated that he had not received the correspondence setting the case for trial and that he is "currently employed in a business venture in Jamaica and has been so engaged for six (6) months". This does not justify his failure to follow his case in Court. A recent case has affirmed the duty of litigants to follow their cases. See Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464, 467 (1968).

In balancing the hardship to the opposing parties in its ruling, the trial court, could properly consider that the case had been litigated all out of proportion to the amounts involved, or the issues presented, in view of the fact that the secondhand furniture involved was included in an agreement which both Miller and his wife had signed initially and upon which the sale of this home was consummated by his attorney.

While we believe the Court could have exercised its discretion in favor of assessing costs upon vacation of the judgment as suggested in the cases cited by the defendant, McLaughlin v. McLaughlin,

supra, and Ryan v. Monson, 47 Ill. App. 2d 220, 231 (1964), we cannot find under the complete record here that the trial court's discretion was improperly exercised in refusing to vacate the judgment.

After the continuance had been refused, counsel for Miller argued to the Court that the Magistrate did not have jurisdiction in that the matter was originally assigned to an Associate Judge of the Court and began as an injunction matter. In substance, there was no longer any issue as to the injunction and the Magistrate's order decides only questions of law based on the amended complaint. However, in any event the objection to the jurisdiction was waived by moving for the continuance before objecting to the jurisdiction. Coleman v. Scott, 76 Ill. App. 2d 417, 420, 421 (1966).

We, therefore, affirm.

AFFIRMED.

MORAN, P.J. and DAVIS, J. concur.

107 I.A. 2nd. 394

No. 68-120 ABSTRACT

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRED ROY RICHMOND and ROBERT KENNETH SANDERS, also known as ROBERT SHAMBLEY, Defendants-Appellants	)	Appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The defendants, Fred Roy Richmond and Robert Kenneth Sanders, also known as Robert Shambley, were jointly indicted and tried for the commission of the criminal offense of an attempt to commit robbery. The jury returned a verdict finding both defendants guilty. Thereafter the defendants' applications for probation were denied and the Court entered its order on the verdict whereby the defendant, Richmond, was sentenced to not less than 9 years nor more than 14 years, and the defendant, Sanders, to not less than 3 years nor more than 7 years, in the Illinois State Penitentiary.

Both defendants appeal from the order of conviction on the grounds that they were denied their right to a fair trial by the incompetent defense made on their behalf by the public defender. Richmond also appeals from the sentence imposed upon him as disproportionate and unjust. No issues as to the indictment, instructions or weight of the evidence are raised in this appeal.

At approximately 9:15 A. M. on November 17, 1967, Richmond and Sanders entered Allen's Grocery Store in Aurora. Richmond went to the meat department at the back of the store. Sanders picked up a few packages from the open shelves and went up to the cash register. Allison Flynn, the counter girl, testified that Sanders then pulled out a gun and told her to put all her money in a paper bag. As Miss Flynn filled a bag as directed, Mr. Allen, the owner of the store, and a milkman entered. On their arrival, Sanders walked away from the counter and Miss Flynn informed Allen that they were being robbed. Allen testified that Sanders then returned to the counter and told him "I have got a man in the back. Don't give me no trouble." Allen did not see any weapon in Sanders' possession. Sanders then called to Richmond who came up from the back of the store and said "I don't even know that man", apparently referring to Sanders. Sanders then told Allen that Miss Flynn was "all messed up" and denied that he was attempting to rob the store. At Sanders' request, Allen searched him and found no gun but felt a "hard object" in his belt. After several minutes, Richmond and Sanders left the store and drove off in Sanders' automobile. The police, alerted by Allen, stopped the car a few blocks away and arrested the defendants. A police officer testified that he searched the car at the point where it was stopped and found a toy gun in the recess under the arm in the front seat.

Sanders and Richmond both testified that they drove to Aurora from Chicago that morning to visit Sanders' sick mother. They stopped at Allen's Grocery, to purchase some sandwich meat and buns. On entering the store, Richmond went to the back to select the meat and Sanders picked up some rolls and coffee and went up to the cashier.

He left those items with the cashier and told her "Count it up to see how much money I owe you" and went back to the aisle to find some taffy apples. When Sanders returned to the counter, Allen grabbed him, "pounded" him on the chest and accused him of trying to rob his store. Sanders denied it and invited Allen to search him. Allen told Sanders that the police had been notified but when they didn't arrive in 20 minutes, the defendants left. Both denied robbing the store or any knowledge of the toy gun.

The defendants point to the failure of the public defender to object to certain leading questions propounded by the State; to his failure to object to answers given by witnesses that were either non-responsive or conjecture; to his failure to object to hearsay testimony; to his failure to follow up on objections he did make where the trial court made no ruling; his failure to make a motion to suppress the evidence allegedly discovered in the defendant's car and admitted as a people's exhibit, the toy gun; and, finally, by the resigned and negative character of his final argument.

Our Supreme Court in the case of The People v. Morris, 3 Ill. 2d 437 (1954) discussed at length the question of competency of court appointed trial counsel both as it relates to an accused's right to a fair trial and to the concept of due process of law under the fourteenth amendment to the Federal constitution. The court concluded on page 449 as follows:

> "However, based both on precedent and reason, we believe that in order to sustain his position here the defendant must clearly establish: (1) actual incompetency of counsel, as reflected by the manner of carrying out his duties as a trial attorney; and (2) substantial prejudice resulting therefrom, without which the outcome would probably have been different. Due to the nature of the inquiry it is hardly possible to be more definite, and each case will have to be judged

> on its own particular facts as they appear in the context of the proceeding under consideration."

In that case, the court found that the defendant had indeed been prejudiced by the incompetency of his court appointed counsel inasmuch as he had been incarcerated for almost 5 months prior to trial and was probably entitled to release under the so-called four-term rule. Similarly, in the recent case of People v. Jackson, 96 Ill. App. 2d 99, 103 (1968) cited by defendants, the Appellate Court, First District, reversed a conviction for sale of narcotics where it appeared that the public defender's conduct "did not measure up to that expected of a competent and conscientious trial attorney" and that there was a valid defense to the charge.

However, the question of competency of counsel does not extend to matters of judgment, discretion or trial tactics. The People v. Wesley, 30 Ill. 2d 131, 136. A new trial will be ordered because of incompetent counsel only where the accused has been substantially prejudiced thereby and a different result would probably have occurred had he been competently defended. The People v. Bernatowicz, 35 Ill. 2d 192, 196 (1966); The People v. Dean, 31 Ill. 2d 214, 218 (1964); The People v. Anthony, 28 Ill. 2d 65, 71, 72 (1963).

When we apply these rules to the case before us, we cannot agree with the defendants' contentions that they were denied a fair trial by the incompetency of the public defender. Certainly some of the questions asked by the State were leading, some of the answers by witnesses were non-responsive and conjectural. However, we recognize that no trial can be entirely free from error nor any trial attorney perfect. We do not see that the defendants were at all prejudiced by the

testimony thus elicited.

Police Officer McCannon testified that he stopped Sanders' car a few blocks from Allen's store pursuant to a radio report of a robbery in the neighborhood. The report included the description of the car and the fact that two persons were in it. McCannon conducted an immediate search of the front seat of the car and found the toy gun. Under these circumstances, the search was proper and, since Sanders had consented to the search, a motion to suppress the evidence would have been futile. The People v. Carter, 38 Ill. 2d 496.

The final argument for the defense, while not epic, emphasized the weaknesses of the State's case and ably summed up the case for the defense. It is obvious to us that the jury returned the verdict it did, not because of the imperfections of trial counsel, but because it chose to believe the witnesses for the State rather than the defendants.

The record of the hearing in aggravation and mitigation and the probation reports indicate that Sanders was 34 years of age, married and the father of 5 children, was employed and earned a fairly substantial income. Richmond was 30 years old, married and the father of one child but was separated from his wife and lived with his father. Both men had prior criminal records including convictions for larceny and robbery. In addition, there were pending charges against Richmond in Cook County for sale and possession of narcotics.

Under the circumstances and in consideration of the relatively inactive role played by Richmond in the attempted robbery, we are unable to find any justification for the sharp disparity in the sentences

imposed by the trial court. Although we are aware that a variance in sentences for the same crime does not in itself indicate an abuse of discretion by the trial court, we do not feel that the interests of justice would be served by the severe sentence imposed on Richmond. Accordingly, we will exercise our authority to "reduce the sentence imposed by the trial court" in accordance with Supreme Court Rule 615 (b) (4) (Ill. Rev. Stat. 1967, C 110 A, # 615 (b) (4)) People v. Marshall, 96 Ill. App. 2d 124, 129 (1968); People v. Blumenshine, 96 Ill. App. 2d 352, 355.

Therefore, the defendants' conviction for robbery is affirmed and Richmond's sentence is reduced to a minimum of 3 years and a maximum of 7 years in the Illinois State Penitentiary. As modified, the judgment of theCircuit Court of Kane County is affirmed.

JUDGMENT MODIFIED AND AFFIRMED.

SEIDENFELD, J. concurs.

MORAN, P. J., dissents.

MORAN, P. J., dissenting:

I dissent from the majority view that reduces the sentence of the defendant, Richmond, as administered by the trial court; however, I concur with the remainder of the opinion.

From a review of the record, I conclude that the defendant, Richmond, did not fulfill the burden of proof necessary to warrant a sentence different from that imposed by the trial court. The guidelines as prescribed by the Supreme Court in the case of The People v. Taylor, 33 Ill. 2d 417, 424 (1965) and followed in The People v. Nelson, 41 Ill. 2d 364, 368-369 (1968) have not been met.

I would therefore affirm the judgment of the trial court without modification.

107 I.A. 2nd 417

No. 68-66

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1969.

SHARON CASSIANI, Plaintiff-Appellant, vs. MICHAEL ROGERS, Defendant-Appellee.	Appeal from the Circuit Court of Rock Island County, Illinois Honorable J. P. Wilamoski Presiding Judge

Abstract

RYAN, J.

This is a personal injury action with verdict and judgment for defendant. Plaintiff has appealed.

On February 5, 1967, plaintiff was driving her vehicle in a westerly direction on 5th Avenue in Moline. Plaintiff stopped her car for a red light at the intersection of 5th Avenue and 12th Street. The car behind the plaintiff's car which was being driven by Burt Marsugula likewise came to a stop. The Marsugula car was then struck by defendant's car and the Marsugula car in turn struck the plaintiff's car.

The evidence showed that 5th Avenue had ice on it which was not continuous but just in portions. The defendant had been following the Marsugula car on 5th Avenue for an undetermined distance. He noticed the red traffic signal. When the Marsugula car began to apply its brakes, defendant observed it and also observed that it did not slide or do anything along those lines in coming to a stop. Defendant was still about a half block from the intersection when he observed the Marsugula car apply its brakes. Both the defendant's car and the Marsugula car were going about the same speed. The defendant was about two and a half car lengths behind the Marsugula car when defendant began to apply his brakes. The Marsugula car came to a stop without sliding

but the defendant's car began to slide and struck the Marsugula car in the rear. Defendant was going about 10 miles per hour at the time of impact.

Defendant further testified that he observed no damage to plaintiff's car at all and no damage to the rear of the Marsugula car which he struck. Defendant's front fender was bent a little. He observed a broken headlight on the Marsugula car.

The plaintiff contends that the defendant was negligent as a matter of law and has asked this court to enter judgment finding for the plaintiff on the issue of liability and to remand the case for a new trial on the question of damages only. The plaintiff also asks this court for the alternative relief of a new trial which she had asked in her post-trial motion.

We cannot agree with plaintiff's contentions. The law in this state pertaining to directed verdicts and judgments n.o.v. was discussed at length and then succinctly set forth by our Supreme Court in Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 510, 229 NE2d 504, when the court said:

> "...verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

Applying the above rule to the facts in this case, we observe that defendant had driven his car without incident for some distance prior to the accident. Although the road had icy patches on it, the icy condition was not general. He was keeping a lookout and observed the car in front of him and also the traffic signal. There was no evidence of excessive speed. He observed the car in front of him slow down and stop without incident. When defendant applied his brakes, however, he skidded into the car in front of him. The defendant apparently struck an icy patch on the road that was not struck by the car in front of him and which may not have been visible to him. We believe that these facts give rise to a jury question on the matter of liability. In order to sustain plaintiff's position, we would have to determine

that after considering all of the evidence in its aspect most favorable to the defendant no contrary verdict could ever stand. Under the evidence in this case, we are not able to make such a determination.

In the case of Palmer v. Poynter, 24 Ill. App2d 68, 163 NE2d 851, it was pointed out that a defendant might be excused from liability where he found himself in a helpless condition. In Piggott v. Newman, 334 Ill. App. 75, 78 NE2d 328, which involved skidding on ice, a judgment was reversed because the trial court had refused an unavoidable accident instruction tendered by the defendant. In Ferdinand v. Lindgren, 32 Ill. App2d 133, 177 NE2d 10, the defendant had skidded on ice into the rear of plaintiff's car and the court ruled that the question of negligence was for the jury saying that under the evidence a jury might have concluded that the defendant did only what an ordinarily careful person would do under the circumstances. Similar rulings have been followed in analogous cases, Weiner v. Battista, 10 Ill. App2d 490, 135 NE2d 113; Tatum v. Rooker, 69 Ill. App2d 6, 216 NE2d 165, and Foster v. VanGilder, 65 Ill. App2d 373, 213 NE2d 421. In the Foster case, the court further pointed out at page 376 that:

> "...The oft repeated rule is that a court of review will not disturb a trial court's ruling on a motion for a new trial unless the record clearly shows that the trial court abused its discretion. The reason for this rule is that a trial judge is in a superior position to determine whether or not a fair trial was had and substantial justice accomplished. Duff v. Ewing, 60 Ill. App2d 382."

In Finley v. New York Central R. Co., 19 Ill. 2d 428, 436, 167 NE2d 212, it was stated as follows:

> "The fact that contrary inferences would be equally supported by the evidence is not sufficient to show unreasonableness of the verdict. It is the jury's function to weigh contradictory evidence, judge the credibility of the witnesses and draw the ultimate conclusion as to the facts. Its conclusion, whether relating to negligence, causation, or any other factual matter should not be set aside merely because different conclusions could be drawn or because judges feel that other results are more reasonable. Dowler v. N.Y.C. & St. L. R.R. Co., 5 Ill2d 125."

Plaintiff has called to our attention the cases of Calvetti v. Seipp, 37 Ill2d 596, 227 NE2d 758; Sughero v. Jewel Tea Co., 66 Ill. App2d 353, 214 NE2d 512, affirmed 37 Ill2d 240, 226 NE2d 28; Kocour v. Mills, 23 Ill. App2d 305, 162 NE2d 497; and Whitlock v. Evans, ___Ill. App2d ___, 240 NE2d 513. None of the cases cited by plaintiff contains the same factual situation as the case at hand. In the Calvetti case, the plaintiff's car and the defendant's car were travelling in opposite directions and the defendant's car skidded into plaintiff's lane of traffic. It was snowing heavily, visibility was poor and the road surface was slick. Likewise in the Sughero case, the defendant's vehicle was travelling in an opposite direction and skidded across the center line and into the path of the plaintiff. Even in holding the defendant liable as a matter of law, however, the court made it clear that it did not hold skidding in and of itself to constitute negligence. The rationale applied by the court was that after plaintiff had shown defendant's vehicle was on the wrong side of the highway and out of control, the defendant had the duty of showing it was there for some reason other than his own negligence. In the Kocour case, the defendant was obviously following another car too closely, was not keeping a proper lookout for traffic signals, changed lanes because he couldn't stop in time and struck the plaintiff's car. In the Whitlock case, the defendant failed to stop for a stop sign and struck the plaintiff who had entered the intersection from a different street. These cases are all clearly distinguishable from the case now under consideration.

Applying the rule announced in Pedrick to the special facts of the case at hand, we find that the trial court committed no error in denying plaintiff's motion for a directed verdict on the question of liability, or in denying plaintiff's motion for judgment n.o.v.

[13] The sole contention urged by the plaintiff in support of her motion for a new trial urges that the verdict was manifestly against the weight of the evidence. Although there is little conflict in the evidence relating to the occurrence, there are certainly different inferences that one can draw therefrom. The jury chose to draw from this evidence inferences which were favorable to the defendant. It is the jury's function to determine the facts, disputed as well as undisputed and to make reasonable inferences therefrom. Hulke v. International Mfg. Co., 14 Ill. App2d 5, 142 NE2d 717. The jury's determination may not be set aside because a judge believes a different conclusion more reasonable. Such action becomes proper only when the verdict is contrary to the manifest weight of the evidence. Guthrie v. Van Hyfte, 36 Ill2d 252, 222 NE2d 492. The record discloses ample evidence to support the jury's finding. It is therefore immaterial that the court might draw a contrary inference. Allendorf v. E. J. & E. Ry Co., 8 Ill2d 164, 133 NE2d 288.

The judgment of the Circuit Court of Rock Island County is affirmed.

AFFIRMED

STOUDER, P. J. and ALLOY, J., concur.

No. 67-96

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1969.

PAUL C. METTILLE and PAUL L. METTILLE, a Minor, by JESSIE M. METTILLE, his next friend,

Plaintiffs-Appellees,

vs.

GULF INSURANCE COMPANY, a Texas Corporation, and W. & W. PONTIAC-CADILLAC, an Illinois Corporation,

Defendants.

W. & W. PONTIAC-CADILLAC, INC., an Illinois Corporation,

Counter-Plaintiff,

vs.

GULF INSURANCE COMPANY, a Texas Corporation,

Counter-Defendant-Appellant.

Appeal from the Circuit Court of LaSalle County, Ottawa, Illinois.

Honorable Walter Dixon Judge Presiding.

ALLOY, J.

Plaintiff Paul C. Mettille had title to a certain automobile which was involved in an accident and substantially damaged. The user and operator of the car was his son, Paul L. Mettille, a minor, 20 years of age. Gulf Insurance Company, defendant, insured the car (including collision insurance). Shortly after the accident, the Gulf agent talked

with Paul, Jr. about whether the car should be repaired or whether it should be declared a total loss with Gulf paying the appraised value of the car. Paul, Jr. said his father would not sign loan papers for another car (since he was not getting along with him) and requested that the car be repaired. He also apparently signed an agreement to this effect.

Gulf Insurance Company then got in touch with Autobody Damage Appraisers of Ottawa, an appraisal organization, and a Mr. Bessey from such organization examined the automobile on June 19, 1963. He then submitted an estimate for repairs showing the sum of $2,619.37. The estimate showed a detailed breakdown of all the damage the appraiser could detect and his estimate of the cost figure of each item. The automobile was then taken to W. & W. Pontiac-Cadillac, a defendant, where it was held until a representative of Gulf directed that the car be repaired. At the time the automobile was turned over to W. & W. Pontiac, Mr. Bessey of the appraisal organization, had W. & W. sign the estimate of repairs showing the figure of $2,619.37. The estimate form also contained the following words:

> "Appraisal includes visible, obvious and even some probable damage due to the severity of damage. There is a definite possibility of hidden damage."

This agreement, which was signed by W. & W. Pontiac also contained the phrase "I understand that this is not an authorization to repair and will call A.D.A. before repairing any hidden damage or open items. I agree to complete and guarantee repairs as appraised for the total of $2,645.37." The record shows that the Gulf representative directed W. & W. to proceed with the repairs, but plaintiff Paul C. Mettille told them to wait and that the car should be "totaled" and the value paid. Finally Mrs. Mettille told them to begin repairing the car. Parts were thereafter ordered and

there was delay in obtaining the parts due to strike and due to the fact that the car model was in production at such time which made parts difficult to obtain. Repairs were finally completed in November 1963. The Gulf Insurance Company representative checked with W. & W. during the time the repairs were being made and were told that there would be an additional charge of $62.70 for certain extra work not covered by the estimate. After repairs had been completed, Gulf tendered a check to W. & W. for $2,425.52, the amount of the original estimate plus $62.70, less a betterment figure of $41.50 and $50 for the deductible.

W. & W., however, claimed that its bill was $3,452.54, the additional costs being principally extra labor. The labor bill totaled $1,400 instead of $750 included in the estimate. Gulf refused to pay the higher figure and W. & W. refused to accept the check for $2,425.52. As a result, W. & W. retained the automobile. The evidence is conflicting whether W. & W. ever notified Gulf or the Gulf representative that the cost of repairs were running higher than the estimate which W. & W. had signed. The W. & W. representative stated, however, that he did advise Mr. Bessey, the appraiser, of the additional cost. He did not contact Gulf directly. Apparently, Mr. Bessey was not a direct employee of Gulf and did not communicate such request to Gulf so far as the record shows. There was some evidence that the representative of W. & W. relied on the appraisers without making a detailed inspection to determine the amount of damage. Mr. Bessey, the appraiser, denied that he had authorized any additional repairs and also stated that he had no authority from Gulf to do anything other than to make the appraisal.

Thereafter, in January, 1964, Paul C. Mettille notified Gulf and W. & W. Pontiac that he had assigned the title to the car to them to mitigate any damage in connection with a future lawsuit. There was some evidence of negotiation as between Gulf and W. & W. which resulted in an offer by Gulf to pay $2,900 and an agreement by W. & W. to accept $3,050. Gulf asserted that this potential settlement was not agreed to by the attorney for the plaintiffs on the premise that he would not be paid a fee in that manner. The value of the car at the time repair was undertaken, was shown of record to be $3,325. There was an assumption that the repair of the car at $2,645.37 would justify the repair. Paul C. Mettille and his son, Paul L. Mettille, filed an action against Gulf Insurance and W. & W. Pontiac to recover for the value of the automobile damaged in the collision and also sought damages from both parties for delay in the repair of the automobile. W. & W. filed a counterclaim against the Mettilles and Gulf Insurance Company seeking the amount of its repair bill for repairs it had made but had never been paid for. Gulf asserted by its answer that it had the option in its policy to repair or replace the automobile and that it had the automobile repaired. It was also specifically alleged that W. & W. had made the repairs and had agreed to make them for $2,645.37 and that W. & W. refused to adhere to such agreement.

In a jury-waived trial, the trial court found in favor of the plaintiffs. Mettilles, as against Gulf Insurance Company in the amount of $3,275.00 (presumably the retail value of the car less the $50 deductible) and also for interest at 5% per annum from June 12, 1963, the date of the collision, to the date of the judgment, totaling $385.82. The trial court also found

that the plaintiffs were entitled to $375 for attorney's fees under the provisions of 1967 Illinois Revised Statutes, Ch. 73 §767, which provides for the allowance of attorneys fees if the refusal to pay is vexatious and without reasonable cause. In addition to such findings the trial court also found in favor of W. & W. as against Gulf Insurance Company and awarded W. & W. $3,000. W. & W. was ordered to deliver the automobile to Gulf Insurance Company.

On appeal in this Court, Gulf Insurance Company contends that the trial court's findings are contrary to the manifest weight of the evidence; that the judgment in favor of W. & W. Pontiac-Cadillac is excessive since there was a written contract that the car was to be repaired for $2,645.37. It is also contended that the evidence in the case does not justify an award for attorney's fees and, also, that the award of $385.82 for interest was not proper since there was no request for interest in the pleadings.

This case is unique in that the delay in disposition of the case has an effect on all the parties. The value of the car has depreciated until it is now of only nominal value. It is clear, however, that as between the plaintiffs Mettille and Gulf Insurance Company, the insurance company had an obligation to either repair the automobile or to pay the Mettilles the fair value of the automobile, if the insurance company elected not to repair (22 I. L. P. Insurance §413; HAUSSLER v. INDEMNITY COMPANY OF AMERICA, 227 Ill. App. 504). Since it elected to repair, such repair was required to be accomplished within a reasonable time. The delay in the present case was unreasonable and the insurance company was, therefore, clearly obligated to pay the plaintiffs the fair value of the automobile. The court was justified in finding in favor of the plaintiffs as against the insurance company in the amount of $3,275.00.

While the complaint did not contain a prayer for the allowance of interest, there was a request for the allowance of damages resulting from the delay. The allowance of the sum of $385.82, measured apparently by a five per cent interest calculation on the basis of delays in paying for the value of the car or delivering a repaired car to plaintiffs , was justified under the pleadings.

The evidence in the cause showing the unreasonable delay also justified the trial court in awarding the sum of $375 as attorney's fees under the applicable statute (1967 Illinois Revised Statutes, Ch. 73 §767). The record sustains the trial court's conclusion that plaintiffs were made victims of unreasonable and vexatious delay without reasonable cause. The conflict between Gulf Insurance Company and W. & W. Pontiac-Cadillac could not be used as an excuse for a refusal to perform the insurance company obligations to plaintiffs.

As to the counter-claim of W. & W. Pontiac-Cadillac for the amount of its repair bill, the evidence was in conflict. The record discloses, however, that the appraiser who had made the estimate at the request of Gulf, specifically noted that there was definite possibility of hidden damage. The agreement also contained a phrase that W. & W. Pontiac-Cadillac was to call the appraiser before repairing any hidden damage or open items. There was testimony that this was done although this was denied by the appraiser. Upon the basis of the record before us, this became a question for the trial court to determine and will not be disturbed on appeal. Since there was no cross-appeal by W. & W. Pontiac-Cadillac in this cause with respect to the amount of the judgment, the judgment as entered in the trial court will stand.

The judgment entered by the Circuit Court of LaSalle County will, therefore, be affirmed.

Affirmed.

Stouder, P. J. and Ryan, J. concur.

107 I.A. 2nd. 440

No. 68-80

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1969

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JOHN ALLEN CURRY, Defendant-Appellant	)	Appeal from the Circuit Court of Hancock County, Illinois Honorable EZRA J. CLARK Presiding

Abstract

RYAN, J.

Following his plea of guilty to the offense of theft of property exceeding $150.00 in value, the defendant was sentenced to an indeterminate sentence of not less than two years nor more than five years in the Illinois State Penitentiary. The sole relief sought on this appeal is a reduction of the punishment imposed by the trial court. The defendant asks this court to reduce the minimum number of years from two years to one year and also asks for a proportionate reduction in the maximum of five years. The authority of a reviewing court to reduce the punishment on appeal is now found in Supreme Court Rule 615(b)(4). This Supreme Court Rule supersedes (using identical language) the authority formerly contained in Ill. Rev. Stat. 1965, Chap. 38, Par. 121-9(b)(4 since repealed.

Following his plea of guilty, the defendant filed a petition for probation. The probation officer conducted an investigation and furnished copies of his report to the defendant and to the court. A hearing on the petition for probation was conducted, at which the defendant testified. At the conclusion of the hearing, the court denied the petition for probation and immediately proceeded with a hearing in aggravation and mitigation of the punishment. The evidence produced at these two hearings disclosed that the defendant had never previously been convicted of a felony, but that he had

been convicted of numerous misdemeanors and traffic violations. The evidence also disclosed a history of serious drinking and related problems, an erratic employment record, and an unstable marital situation which finally ended in divorce followed by the customary unfortunate problems pertaining to the support of the minor children. The evidence also disclosed that at the time of his arrest for this offense, the defendant had a loaded pistol in his possession.

We feel that it is unnecessary to detail all the facts surrounding the offense in question or to recite in detail the evidence heard by the trial court. It is sufficient to say that the trial court heard the evidence that was presented and had a superior opportunity to make a sound determination concerning the punishment to be imposed than this court now has from its detached position and from its evaluation of a printed record. The court in People v. Taylor, 33 Il12d 417, 424, 211 NE2d 673, stated that where it is contended that the punishment imposed in a particular case is excessive, though within the limits prescribed by the legislature, the court should not disturb the sentence unless it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose. We see no indication in this case that the imposition of a two-year minimum sentence instead of a one-year minimum sentence evidences any departure from the fundamental law and its spirit and purpose. We do not feel that it was the intent of the legislature under the former section of the statute, since repealed, or of the Supreme Court under present Supreme Court Rule 615(b)(4) that a reviewing court should attempt the fine distinction in reviewing the sentence imposed by the trial court that the defendant here requests us to exercise. The judgment of the circuit court of Hancock County is affirmed.

AFFIRMED

STOUDER, P.J. and ALLOY, J., concur.